IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	**3:16-cr-00051-BR**
Plaintiff,	**ORDER DENYING MOTION TO SEVER COUNT FOUR**
v.	
AMMON BUNDY, JON RITZHEIMER, JOSEPH O'SHAUGHNESSY, RYAN PAYNE, RYAN BUNDY, BRIAN CAVALIER, SHAWNA COX, PETER SANTILLI, JASON PATRICK, DUANE LEO EHMER, DYLAN ANDERSON, SEAN ANDERSON, DAVID LEE FRY, JEFF WAYNE BANTA, SANDRA LYNN ANDERSON, KENNETH MEDENBACH, BLAINE COOPER, WESLEY KJAR, COREY LEQUIEU, NEIL WAMPLER, JASON CHARLES BLOMGREN, DARRYL WILLIAM THORN, GEOFFREY STANEK, TRAVIS COX, ERIC LEE FLORES, and JAKE RYAN,	
Defendants.	

BROWN, Judge.

This matter comes before the Court on the Motion (#810) to Sever Count Four filed by Defendant Ryan Payne and on behalf of all Defendants.

Federal Rule of Criminal Procedure 8(a) permits joinder of offenses if the offenses are (1) "of the same or similar character," (2) "based on the same act or transaction," or (3) "connected with or constitute parts of a common scheme or plan." Fed R. Crim. P. 8(a). *See also United States v. Jawara*, 474 F.3d 565, 572 (9th Cir. 2006). The validity of joinder of offenses is "'determined solely by the allegations in the indictment.'" *Jawara*, 474 F.3d at 572 (quoting *United States v. Terry*, 911 F.2d 272, 276 (9th Cir. 1990)). "Rule 8 has been 'broadly construed in favor of initial joinder.'" *Jawara*, 474 F.3d at 573 (quoting *United States v. Friedman*, 445 F.2d 1076, 1082 (9th Cir. 1971)).

To determine whether the counts are of the same or similar character, the court considers "factors such as the elements of the statutory offenses, the temporal proximity of the acts, the likelihood and extent of evidentiary overlap, the physical location of the acts, the modus operandi of the crimes, and the identity of the victims." *Jawara*, 474 F.3d at 578. Joined offenses arise out of a common scheme or plan when "'commission of one of the offenses either depended upon or necessarily led to the commission of the other; proof of the one act either constituted or depended upon proof of the other.'" *Id*. at 574 (quoting *United States v. Halper*, 590 F.2d 422, 429 (2d Cir. 1978)).

Defendants contend Count Four should be severed because it relates solely to Defendant Kenneth Medenbach's alleged theft of a government vehicle while at the Malheur National Wildlife Refuge (MNWR). Defendants contend if the government had charged Count Four separately, evidence of the theft of the vehicle would not be admissible at trial as to the other counts.

The Superseding Indictment, however, unambiguously reflects the alleged theft of the vehicle is related to the conspiracy charge in Count One. In Count One the government alleges Defendants (including Defendant Medenbach) "occupied" the MNWR beginning on January 2, 2016. The government alleges the purpose of the conspiracy and the "occup[ation]" of the MNWR was to "prevent by force, intimidation, and threats, officers and employees of the United States Fish and Wildlife Service and the Bureau of Land Management . . . from discharging the duties of their office." Superseding Indictment (#282) at 2-3.

In Count Four the government alleges on January 15, 2016, that Defendant Medenbach willfully stole a truck that was the property of the U.S. Fish and Wildlife Service. *Id.* at 5. Also included in the Superseding Indictment are other counts against other Defendants who are also charged in Count One and that relate to the theft and/or depredation of government property during that same period.

It is clear from the face of the Superseding Indictment,

therefore, that the government alleges the conspiracy charged in Count One "necessarily led to the commission" of the alleged theft of the truck in Count Four and that there is a significant temporal, physical, evidentiary, and *modus operandi* nexus between the alleged crimes in addition to a commonality of victims.

Moreover, the additional evidence that is relevant to Count Four that would not otherwise be relevant to other counts is expected to be minimal, and there is virtually no risk of prejudice as a result of trying Count Four along with the other counts because the conduct alleged in Count Four is in the nature of acts in the course of the conspiracy alleged in Count One. In addition, the cost of a completely separate trial as to Count Four (which would likely include a significant amount of evidence that was presented at the trial on the other counts) would be unreasonable because Count Four can be resolved efficiently and fairly in a trial with the other counts.

Count Four, therefore, is both "of the same or similar character" as Count One and the other counts in the Superseding Indictment and is "connected with or constitute[s] parts of a common scheme or plan" with the other counts.

On this record, therefore, the Court concludes Count Four is properly joined with the other counts in the Superseding Indictment under Rule 8, and, therefore, pretrial severance is inappropriate.

CONCLUSION

For these reasons, the Court **DENIES** Defendants' Motion (#810) to Sever Count Four.

IT IS SO ORDERED.

DATED this 15th day of July, 2016.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge